No. 82-856

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In the Supreme Court of the United States

OCTOBER TERM, 1982

**UNITED STATES OF AMERICA, ex rel.
GERALD SCARPELLI,**

Petitioner,

vs.

ROBERT A. FISCELLA
~~RICHARD GEORGE,~~

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision of the United States Court of Appeals for the Seventh Circuit runs afoul of the per se harmful error rule in *Chipman* v. *Mercer*, 628 F.2d 528 (9 Cir., 1980), creating an intercircuit conflict.

2. Whether the decision of the United States Court of Appeals for the Seventh Circuit improperly construes this Court's decision in *Sumner* v. *Mata*, 449 U.S. 539 (1981), creating a conflict between the Seventh Circuit and this Court.

3. Whether the decision of the United States Court of Appeals for the Seventh Circuit, which concerns the issue of the trial court's curtailment of legitimate cross-examination without redress, is an issue of general significance and importance.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PRAYER

Petitioner, Gerald Scarpelli, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Seventh Circuit appears in Appendix A attached hereto. The order of the United States Court of Appeals denying a Petition for Rehearing *en banc* appears in Appendix B, attached hereto. The Memorandum

Opinion and Order of the District Court for the Northern District of Illinois appears in Appendix C, attached hereto. The Memorandum Opinion and Order of the District Court for the Northern District of Illinois denying Respondent's motion for reconsideration appears in Appendix D, attached hereto.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 26, 1982. Petitioner filed a Petition for Rehearing with *en banc* suggestion, which was denied in an order entered on September 20, 1982. This Petition is filed within 60 days of said ruling of the United States Court of Appeals for the Seventh Circuit, and jurisdiction is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the United States Constitution are herein involved. The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On February 8, 1977, Petitioner was arrested for auto theft and possession of burglary tools. Trial was held in July 1979 before a jury. The State's chief witness was Clyde Culen, a police officer who allegedly witnessed Petitioner commit the crimes for which he was arrested. On cross-examination, the trial court sustained objections to questions relating to Culen's credibility, his trial preparation, and his identification of Petitioner. Specifically, Petitioner was precluded from testing Culen's credibility with respect to the source of his purported knowledge, his powers of discernment, memory and description.

Petitioner's testimony at trial disputed Culen's observations. Petitioner's testimony was bolstered by the testimony of two disinterested eyewitnesses, William Congleton and Linda McCormick. Congleton and McCormick had no prior connection with Petitioner. Both eyewitnesses testified that they saw a person, other than Petitioner and Culen, exit from the car and run in the opposite direction.

The jury subsequently returned guilty verdicts on both counts. On appeal, the Appellate Court of Illinois upheld the convictions. The Supreme Court of Illinois denied Petitioner's Petition for Leave to Appeal, and this Court denied Petitioner's Petition for Writ of Certiorari. 450 U.S. 915 (1981).

Petitioner filed the Petition for Writ of Habeas Corpus before the United States District Court for the Northern District of Illinois. On September 30, 1981 the District

Court granted the Writ of Habeas Corpus. After Respondent requested reconsideration, the District Court entered a second Memorandum Opinion and Order on October 30, 1981, reaffirming its earlier decision granting issuance of the Writ. Respondent appealed and on August 26, 1982 the United States Court of Appeals for the Seventh Circuit reversed the District Court's order granting the Writ. Petitioner filed a Petition for Rehearing with *en banc* suggestion, which was denied on September 20, 1982.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Seventh Circuit runs afoul of the per se harmful error rule in *Chipman* v. *Mercer,* 628 F.2d 528 (9 Cir., 1980), creating an intercircuit conflict. The decision of the Court of Appeals for the Seventh Circuit improperly construes this Court's decision in *Sumner* v. *Mata,* 449 U.S. 539 (1981), creating a conflict between the Seventh Circuit and this Court. The decision of the Court of Appeals, which concerns the issue of the trial court's curtailment of legitimate cross-examination without redress, is an issue of general significance and importance.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense."

The right of confrontation, which includes the right to cross-examination, as a fundamental right applies to the states through the Fourteenth Amendment. *Pointer* v. *Texas,* 380 U.S. 400, 403-404, 13 L.Ed.2d 923, 926-927, 85 S.Ct. 1065 (1965).

In *Smith* v. *Illinois,* 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed. 2d 956 (1968), the defendant was not allowed to cross-examine the principal witness against him in regard to the witness' name and address. Justice Stewart, for the majority, cited with approval the principle enunciated in *Brookhart* v. *Janis,* 384 U.S. 1, 3, 16 L.Ed.2d 314, 316, 86 S.Ct. 1245, that a denial of cross-examination, without

waiver, would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure the error. *Smith* v. *Illinois*, 390 U.S. at 131, 19 L.Ed.2d at 959.

In *Davis* v. *Alaska*, 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1104 (1974), the defendant was not allowed to cross-examine a key prosecution witness in regard to his juvenile probationary status. The defense sought to pursue that line of questioning to explore an area of potential bias. Justice Burger, in the majority opinion, emphasized the importance of cross-examination as the principal means by which the believability of a witness and the truth of the witness' testimony are tested. *Id.* at 316, 39 L.Ed.2d at 353. In *Davis*, the defendant did not seek to test the witness' perception and memory. The defendant sought to question the witness to ascertain possible bias for purposes of impeachment. Justice Burger stated:

> "We cannot speculate as to whether the jury, as sole judge of credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that juors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's acts'." (citation omitted). *Id.* at 317, 39 L.Ed.2d at 354.

Citing *Brookhart* v. *Janis*, *supra*, and *Smith* v. *Illinois*, *supra*, the circumscription of cross-examination was found to be a constitutional error of the first magnitude, which could not be cured by any showing of want of prejudice. *Davis* v. *Alaska*, 415 U.S. at 318, 39 L.Ed.2d at 355.

In *Chipman* v. *Mercer,* 628 F.2d 528 (9 Cir., 1980), the trial court limited the defendant's cross-examination for potential bias or prejudice of the sole eyewitness. The Court in *Chipman* held that the denial of cross-examination for bias or prejudice violated the confrontation clause and that the question of whether the error is harmless in a particular case is not considered. *Id.* at 533. The Court stated that a trial court normally has broad discretion concerning the scope of cross-examination. However, the trial court's broad discretion is circumscribed unless the threshold level of cross-examination constitutionally required is satisfied. *Id.* at 530. The finding of the Court in *Chipman* of per se harm is limited to when a court finds that the denial of cross-examination rises to the level of a violation of the constitutionally guaranteed right of confrontation. *Id.* at 533. As the Court stated:

> "The seeming harshness of that rule (the per se harm rule) is diminished, however, because a confrontation clause violation generally does not occur unless the denial of cross-examination is one of considerable relevance. The degree of relevance, in turn, bears a close relation to whether denial of confrontation was prejudicial." *Id.*

In the case at bar, the District Court concurred with the Appellate Court of Illinois in finding that the trial court erred by unduly restricting Petitioner's right of cross-examination. Memorandum Opinion and Order dated September 30, 1981, page 2-3; and *People* v. *Scarpelli,* 82 Ill. App.3d 689, 402 N.E.2d 915, 922 (1980). The District Court, citing this Court's analysis in *Brookhart* v. *Janis, supra,* and *Davis* v. *Alaska, supra,* held that the confrontation clause errors which occurred in the case present per se grounds for reversal. Memorandum Opinion and Order dated September 30, 1981, pages 3-4.

The District Court amplified its earlier ruling in a Memorandum Opinion and Order dated October 30, 1981. The Court stated:

> "In sum, the per se rule upon which I rely is narrow. It applies only if the defendant can establish two predicate factors, namely, (1) that the witness he attempted to cross-examine provided testimony absolutely 'crucial' to his conviction, and (2) that the restriction imposed by the trial judge rendered 'ineffective' whatever cross-examination was allowed. Thus the per se rule will not apply if the witness' testimony was so unnecessary or cumulative that a conviction would have been warranted even if the defendant had succeeded in completely destroying the witness' credibility. Nor will it apply if the trial judge's rulings merely prevented the defendant from asking questions which were neither repetitious or of marginal relevance." Memorandum Order and Opinion dated October 30, 1981, page 8.

The District Court found that both factors were present and that Petitioner was prevented from effectively challenging his primary accuser. The Court of Appeals for the Seventh Circuit reversed the District Court's opinion in a decision dated August 26, 1982. The Court found that this Court's opinions in *Davis* v. *Alaska, supra,* and *Smith* v. *Illinois, supra,* do not explicitly state that abrogation of a defendant's Sixth Amendment rights to confront and cross-examine an accuser constitutes *per se* harm. Therefore, the Court concluded that *Davis* v. *Alaska* and *Smith* v. *Illinois* do not stand for the proposition that *per se* harm results from the denial of the constitutionally guaranteed right to confrontation. Slip Opinion, page 3-4. Further, the Court disposed of the Ninth Circuit's decision in *Chipman* v. *Mercer, supra,* by declaring that the *Chipman* decision did not, in fact, articulate a *per se* harm-

ful rule. Slip Opinion, page 4. For support, the Court relied on the final sentence of the *Chipman* decision which states:

> "We hold that the denial of cross-examination for bias or prejudice in this case violated the confrontation clause." *Chipman* v. *Mercer*, 628 F.2d at 533; Slip Opinion, page 4.

Contrary to the Court's interpretation, the use of the phrase "in this case" in the *Chipman* decision reflects that "confrontation questions must be resolved on a case by case basis based on examination of all the circumstances and evidence." *Chipman* v. *Mercer*, 628 F.2d at 530. In *United States* v. *Uramoto*, 638 F.2d 84, 87 (9 Cir., 1980), the Court reaffirmed the *per se* harmful standard applicable when a trial court so restricts cross-examination that a defendant's Sixth Amendment right to confrontation is abrogated.

Petitioner respectfully suggests that the opinion of the Court of Appeals for the Seventh Circuit, which repudiates the *per se* harm rule enunciated in the Ninth Circuit's decision in *Chipman* v. *Mercer, supra*, is inconsistent with this Court's decisions in *Brookhart* v. *Janis, supra, Smith* v. *Illinois, supra*, and *Davis* v. *Alaska, supra*. The *per se* harm rule only applies in a very narrow category of cases in which a violation of constitutional magnitude has been found. The decision of the Court of Appeals in this case creates intercircuit conflict notwithstanding the Seventh Circuit's effort to interpret *Chipman* v. *Mercer, supra*, to in fact require a showing that the restrictions in cross-examination were not harmless. The Court of Appeals sophistry cannot withstand scrutiny.

The decision of the Court of Appeals also misconstrues this Court's decision in *Sumner* v. *Mata*, 449 U.S. 539

(1981). The decision in *Sumner* v. *Mata* specifically held that state factual findings are entitled to a "presumption of correctness" in evaluating constitutional issues properly raised under 28 U.S.C. 2254. These findings can be overturned, if at all, only when they are not fairly supported by the record. *Id.* at 550.

In this case, the Appellate Court of Illinois specifically found, in several instances, that Petitioner was denied his right of cross-examination. The District Court, by its decision, accorded these factual findings their due presumption of correctness. Indeed, the record is replete with some 63 instances of improper and undue restrictions by the trial court on Petitioner's right to cross-examine and confront. The Court of Appeals, nonetheless, conducted a *de novo* review.

In order to conduct a *de novo* review, the Court of Appeals construed this Court's holding in *Sumner* v. *Mata, supra,* very narrowly. The Court stated:

> "The Court's finding that Scarpelli's Sixth Amendment right was violated is a mixed question of law and fact, and, consequently, Mata does not preclude us from determining *de novo* whether Scarpelli was denied his constitutional rights." Slip Opinion, page 6.

The Court of Appeals' narrow interpretation of *Sumner* v. *Mata* establishes a dangerous precedent. A court may always find that the issue presented contains a mixed question of fact and law, therefore allowing *de novo* review. The Court of Appeals' articulated exception to *Sumner* v. *Mata,* in effect, results in an exception that swallows the rule. Petitioner, therefore, respectfully suggests that the Court of Appeals' interpretation of *Sumner* v. *Mata* creates such a broad exception that a conflict exists between the Seventh Circuit and this Court.

The decision of the U.S. Court of Appeals for the Seventh Circuit raises an issue of general significance and importance. The decision, which grants trial courts a free hand to curtail legitimate cross-examination without redress, establishes a dangerous precedent.

The Court of Appeals' decision states that it is "mindful that cross-examination is the cornerstone of the criminal trial process, . . . and that the defendant must be given wide latitude to explore a witness' story, to test the witness' perceptions and memory and to impeach his credibility." Slip Opinion at page 4. Yet, the Court refused to recognize the per se harm rule that results from the abrogation of this fundamental right. The Court of Appeals' refusal to recognize the *per se* harmful rule resulted in the Court's sanctioning of the trial court's rulings restricting Petitioner's right of cross-examination. Petitioner was precluded by the trial court's rulings from examining Culen in each of the following areas: (1) whether Culen had previously testified in the cause; (2) Culen's experience as a testifying witness; (3) whether Culen had read police reports about the incident prior to testifying; (4) how many times Culen spoke to the State's Attorney prior to his testimony in court; (5) Culen's employment between the date of the alleged offense and the trial; (6) whether Culen had worked other than as a police officer on the date of the alleged offense; (7) whether Culen normally had a routine patrol in a marked squad car; (8) whether Culen's superiors had assigned him to the stake-out; (9) whether Culen called in license numbers to be checked other than the car in question; (10) whether Culen's experience of eight months as a police officer involved only patrol, or training as well; (11) whether Culen's past experience on stake-outs was successful; (12) the physical characteris-

tics of the parking lot; (13) whether Culen had previously testified prior to the trial contrary to his trial testimony; (14) the path taken by the vehicle; (15) what certain pictures and diagrams, state exhibits, showed; (16) what the people in the parking lot were doing at the time in question; (17) the color of the car in question; (18) the physical characteristics of the defendant; (19) the physical description and characteristics of the perpetrators of the offense; (20) whether Culen had his gun out when he approached the man in the parking lot; (21) whether Culen's police report differed from his trial testimony; and (22) whether the offender wore gloves.

In addition, the trial record is replete with prejudicial comments made by the trial court as he erroneously sustained objection after objection; "are you trying to impeach the witness. I don't understand what it is you are trying to do at this point." "The issue here is whether or not the defendant committed the offense he is charged with. This officer is not on trial." "You (defense counsel) can certainly argue that if you think that's different. You can argue that to the jury . . . till hell freezes over as far as I'm concerned, but you're not going to go any farther with this examination." "It's (the height of the defendant) not an issue in this case." "If you ask another question, I'm going to hold you in contempt of court, where I have sustained an objection." "It's an attempt by counsel to impeach on collateral matters and that's improper." "The absence of whether the officer put that in the police report has no bearing whatsoever on his testimony."

Petitioner was thus precluded from testing the credibility of Culen with respect to the source of his purported knowledge, his powers of discernment, memory and de-

scription. The trial court refused to allow defense counsel to question Culen with regard to contrary statements or actions given or done at another time. The Court precluded defense counsel from exploring Culen's bias towards Petitioner, his experience, his ability to observe, his utilization of police reports or conversations with the prosecutor prior to testifying in order to refresh his memory. Defense counsel was presented from questioning Culen about a police diagram Culen drew of the scene.

A conflict existed in the evidence as to whether only one person exited from the subject vehicle or two persons exited from the vehicle. Due to the conflict, it was vital that defense counsel be permitted to cross-examine Culen with precision as to Culen's recollection with regard to the height and size of the individual identified by Culen. Nonetheless, the trial court precluded such examination, precluded cross-examination with respect to Culen's previous testimony on the subject, and even threatened defense counsel with contempt if he persisted in the vital and legitimate inquiry. Under the circumstances, the Appellate Court of Illinois, the District Court, and the Court of Appeals found it was error of constitutional magnitude for the trial court to fail to permit Petitioner to cross-examine Culen concerning his identification testimony. Nonetheless, the Court of Appeals' decision places Petitioner in a form of "Catch 22." While the Court of Appeals recognizes that Petitioner was denied his constitutional right to cross-examination, it nonetheless finds sufficient other evidence to support a conviction. However, if Petitioner were given the opportunity to cross-examine Culen there is a substantial likelihood that the record would not reveal sufficient evidence to support his conviction. The State's case stands or falls on the testimony

of Culen alone. In view of the innocent explanation provided by Petitioner and other defense witnesses, unrestricted cross-examination would have influenced the jury's determination.

The error in not permitting cross-examination of the crucial State's witness in traditional legitimate and specifically crucial areas could not be said to not constitute per se harm. A finding of per se harm would not impinge on the trial court's broad discretion to expedite proceedings and prevent repetitions and irrelevant testimony. The application of the per se harm rule enunciated in *Chipman* v. *Mercer, supra,* which was misinterpreted in the Court of Appeals decision, has a very narrow application. In any event, the Court of Appeals incorrectly placed emphasis on the trial court's discretion over constitutionally guaranteed rights. The trial court's desire to control proceedings must give way to the constitutionally guaranteed right of the defendant to confront his accuser through adequate cross-examination.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Honorable Court issue its Writ of Certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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